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No. 965

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In the Supreme Court of the United States

October Term, 1943.

SKELLY OIL COMPANY, *Petitioner,*

vs.

MADIE RAY AMACKER, INDIVIDUALLY AND AS
GUARDIAN OF BARBARA ANN AMACKER,
ET AL., MINORS, Respondents.

Petition for Writ of Certiorari, and Brief in
Support Thereof.

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IN THE SUPREME COURT OF THE UNITED STATES.

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SKELLY OIL COMPANY, *Petitioner,*

vs.

**MADIE RAY AMACKER, INDIVIDUALLY AND AS
GUARDIAN OF BARBARA ANN AMACKER,**

ET AL., MINORS, Respondents.

**PETITION FOR WRIT OF *CERTIORARI* TO THE
CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT.**

*To the Honorable Harlan Fiske Stone, Chief Justice of the
United States, and the Associate Justices of the Supreme
Court of the United States:*

Your petitioner, Skelly Oil Company, respectfully prays for the issuance of a writ of *certiorari* to the Circuit Court of Appeals for the Fifth Circuit to review the judgment of that court entered on December 16, 1943 (R. 497), pursuant to a majority opinion of the court (R. 490-493, 140 F. (2d) 21), motion of respondents for a rehearing (R. 498-511) denied February 7, 1944 (R. 512), in a case numbered and entitled on its docket "No. 10772, Skelly Oil Company, appellant, *vs.* Madie Ray Amacker, individually and as guardian of Barbara Ann Amacker, *et al.*, minors, appellees." Thereby said court reversed a judgment (R. 443) of the United

States District Court for the Western District of Texas in favor of the respondents (plaintiffs in the District Court), and directed a new trial of the case, instead, as petitioner urged, of directing a judgment for petitioner or itself rendering such judgment.

A certified transcript of the record in the case, including the proceedings in the said Circuit Court of Appeals, is presented herewith in accordance with Rule 38 of this Court.

Summary Statement of Matter Involved.

Respondents, Madie Ray Amacker, individually and as guardian of Barbara Ann Amacker, Sandra Ray Amacker and Elmer O'Neal Amacker, Jr., minors, they being the widow and three minor children of Elmer O'Neal Amacker, deceased, residents and citizens of the State of Texas, sued petitioner, Skelly Oil Company, a Delaware corporation, to recover \$132,000.00 as damages alleged to be due them by reason of alleged acts of negligence of petitioner, alleged to have resulted in the injury of Elmer O'Neal Amacker while he was performing physical labor in cleaning sediment out of an oil stock tank on an oil and gas lease of petitioner on land located in Andrews County, Texas, from which injury Amacker was alleged to have died. (R. 1-9)

The case was twice tried; the first trial resulted in a judgment for petitioner, based on a directed verdict in its favor, which was reversed on appeal and a new trial ordered (132 F. (2d) 431); and on the second trial a verdict and judgment were rendered for respondents and on appeal (the second appeal) this was reversed and another trial ordered, as stated above, one judge dissenting, his view being that petitioner's motion for a directed verdict should have been sustained. (R. 493-496, 140 F. (2d) 23)

In their First Amended Original Petition (R. 2 to 9), filed after the first reversal, respondents alleged (R. 3) that Elmer O'Neal Amacker was an invitee of petitioner due to the fact he was working as an employee of Gibbins and Heasley, Inc., who in turn was performing work for petitioner in cleaning out a tank containing poisonous gas and fumes; but, they also alleged that petitioner "had full charge and control" of Amacker. They alleged that petitioner was guilty of certain acts of negligence in failing to do certain things, among them a failure to provide Amacker with a gas mask (R. 4) and in not steaming out the tank in advance of the cleaning work (R. 4-5). In paragraph V of the amended petition respondents specially alleged that the work which was contracted by petitioner to Gibbins and Heasley, Inc., was of such an exceptional and highly hazardous danger that petitioner was estopped to deny liability by alleging the independence of Gibbins and Heasley, Inc., Amacker's employer.

Petitioner filed its first amended answer (R. 9-13) in which, among various defenses, it denied each and all the alleged acts of negligence and also denied that Amacker was its invitee (R. 10). Specially answering the estopped allegation based on the inherently dangerous allegation in paragraph V of the amended petition (and solely for an answer to that allegation), the petitioner (par. "e" of its answer, R. 10-11) admitted the alleged independence of Gibbins and Heasley, Inc., and pleaded such independence, that Amacker was the employee of the contractor and working under the contractor's control and denied the other allegations of said paragraph. Petitioner also set forth certain special defenses (R. 11-12) including its "Fifth Defense" reading:

"This defendant alleges that the plaintiffs herein

are not entitled to recover actual damages, if any, against it for the reason that it was a subscriber under the Workmen's Compensation Law of Texas at the time of the alleged accident."

On these amended pleadings the second trial was had. Thereat the testimony of *the respondents* (which showed that Amacker became ill while engaged, with another worker, on the second day in the tank cleaning work and later on died), in so far as it related to the legal relationship between Amacker (and his co-worker) and the petitioner, so petitioner contended at the second trial and on the second appeal, was undisputed to the effect that Amacker, while a general employee of Gibbins and Heasley, Inc., was (as was also his co-worker) on the occasion in question a special employee of petitioner, that is, it showed that petitioner had the "right of control" of Amacker,* and that testimony was supplemented by testimony introduced by petitioner to the same effect. All the testimony in the record relating to that question is copied, with the record references, in Appendix "A" attached to this petition and the supporting brief and same is made a part hereof. Petitioner also proved (R. 196-220), and respondents, while at first objecting (R. 191), later (by Mr. Russell, one of respondents' counsel) admitted (R. 249-250), that petitioner was a subscriber under said compensation law and carried compensation insurance, whereupon the proof thereof was admitted in evidence without objection (R. 250).

In its original answer, on which, with the respondents' original petition, the case was tried the first time, the petitioner did not plead that it was a subscriber under the compensation law of Texas. At that trial, as the majority opin-

*Under the Texas decisions, as shown in the brief which follows, one who has the right of control of a workman is his employer.

ion on the second appeal discloses (see, second paragraph of *per curiam* opinion, R. 491, 140 F. (2d) 22), the respondents, as plaintiffs, claimed the independence of Gibbins and Heasley, Inc., that Amacker was that company's employee and that he was an invitee of petitioner, and the petitioner, as defendant, proceeded on the theory that Amacker was its invitee as alleged by respondents. At that trial the District Court held that petitioner had breached no duty it owed to Amacker, and directed a verdict and entered a judgment for petitioner. (See, 132 F. (2d) 432.)

But, the fact that respondents so contended or proceeded at the first trial does not appear from the opinion on the first appeal (132 F. (2d) 431), although it does therein appear that petitioner did so. As previously stated, and as the opinion on the second appeal discloses, after the first reversal and before the second trial, petitioner not only denied that Amacker was its invitee, but also pleaded its aforesaid Fifth Defense. After the verdict against it, petitioner (merely as a precaution), with leave of the court (R. 16), filed its Eighth Defense (R. 14), readings as follows:

"Defendant further alleges that according to the undisputed evidence in this case the deceased, Elmer O'Neal Amacker, was at the time of the alleged accident complained of a special employee of this defendant and was working under the direction and control of this defendant in the performance of the tank cleaning work which this defendant was doing at the time of said alleged accident and that at said time this defendant was a subscriber under the Workmen's Compensation Law of Texas and, because of said facts, the plaintiffs are not entitled to any relief sought in this action."

This was done under the provisions of Rule 15 (b) of the Rules of Civil Procedure.

On the first appeal the Court of Appeals held in substance and effect that under the testimony the deceased Amacker was a special employee of petitioner, not petitioner's invitee, and petitioner contended and still contends that it was solely by reason of that holding that the court then held that the case should have been submitted to the jury and reversed the judgment in favor of petitioner and directed a new trial. In its opinion (on the first appeal) the court said:

"It was in testimony too that deceased had worked as a roustabout for many years in oil fields, that Gibbins & Heasley, Inc., his employer who had sent him to the defendant to do this job of cleaning out the tanks was in the business of furnishing men to oil companies for work as called for, *and that it either sent them, as it did this time, without a foreman and without tools, or with a foreman and with tools, according to request. That on this occasion it was merely called upon to send two men without a foreman and without tools, that the defendant was to direct when and how they were to do the work and provide them with the necessary tools to do it.*"*

Therein it also said:

"*On this record, the defendant had supervision and control over deceased and was under a duty to exercise due care to see that the dangerous work it put him to doing was done by reasonably safe and prudent means and methods, and deceased in going into the tank to do the work required with the tools and equipment and in the way provided by the defendant * * **" etc.

At the conclusion of the evidence at the second trial, the testimony again showing that Amacker was its em-

*Italics supplied unless otherwise indicated.

ployee, and petitioner having this time pleaded and proved it was under the compensation law, petitioner filed a motion (R. 16-19) for a directed verdict in its favor. Two grounds, IX and X (R. 18-19) of said motion were in substance, *first*, that the Court of Appeals had held on first appeal that Amacker was petitioner's employee and that such became the law of the case as the testimony at the second trial was substantially the same on that question as on the first trial, and petitioner was this time shown to have been a subscriber under the compensation law, and, *second*, because the undisputed evidence showed that Amacker was the employee of petitioner, that the respondents had alleged that petitioner "had full charge and control" of him in the tank cleaning work, and that petitioner was a subscriber under the Workmen's Compensation Law.

Said compensation law prohibits the maintenance of an action for actual damages* in a case of this character. The Workmen's Compensation Act of Texas, in Section 1 of Article 8309, Vernon's Civil Statutes of the State of Texas, defines an "Employee" as follows:

"'Employee' shall mean every person in the service of another under any contract of hire expressed or implied, oral or written, * * *."

Section 3 of Article 8306 of said act provides:

"*Sec. 3.* The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of

*Exemplary damages, not sought in this action, are recoverable only in extreme cases. Section 5 of Article 8306; *Bennett v. Howard*, (Tex. Sup.) 170 S. W. (2d) 709.

action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for."

Compensation under said statute is recoverable only by proceedings instituted before the Industrial Accident Board of the State of Texas, and the courts are without jurisdiction, except on appeal from a final order of said Board, of a claim for compensation. Sec. 5 of Article 8307; *Mangas v. Wadley*, (Tex. Sup. Ct.) 285 S. W. 1084; *American Surety Co. v. Mays*, (Tex. Civ. App.) 157 S. W. (2d) 444; *Hart v. Gulf Casualty Co.*, (Tex. Civ. App.) 170 S. W. (2d) 491. Respondents have never yet sought to recover compensation from petitioner. Therefore the reversal in this case could not have been to give the respondents an opportunity to recover compensation in this action.

The District Court denied petitioner's said motion (R. 422), and submitted the case to the jury on instructions (R. 427-440), including an instruction (R. 435) that as a matter of law under the evidence Amacker was an invitee on the premises of the petitioner.

The District Court expressed the view (R. 419) that no case had been made out by respondents, but ruled that the motion of petitioner for an instructed verdict should be denied because it felt (R. 419-422) that it was bound to submit the case to the jury under the opinion (on the first appeal) of the Court of Appeals. The District Court, in commenting on the defense of no liability for damages as at common law, among other things said (R. 420):

"As the court says, the court is disposed to let the

Circuit Court of Appeals take the burden of this question as well as of the case as a whole, * * *

The jury returned a verdict against petitioner (R. 442), on which a judgment was entered (R. 443).

Petitioner thereupon filed a motion for judgment in its favor notwithstanding the verdict or, in the alternative, for a new trial (R. 444). The 8th and 9th grounds (R. 446) of the former were the same as petitioner's grounds for a directed verdict. Said motion was denied (R. 461-462).

On June 28, 1943, the District Court approved petitioner's bill of exceptions (R. 467-470), which included Exceptions IX and X (R. 468-469), which stated the same points and contentions of petitioner that were set forth in its motion for a directed verdict. On July 17, 1943, petitioner filed its notice of appeal (R. 463). The points to be relied on (R. 473-474) included those set forth in petitioner's motion for a directed verdict. The first and principal specification of error relied on by petitioner, and set forth in its brief on the appeal, was stated as follows:

"The trial court erred in denying defendant's motion for a directed verdict because:

"(a) The undisputed evidence establishes that the decedent Amacker, while in the general employ of Gibbins & Heasley, Inc., was a special employee of Skelly Oil Company. It shows that he was such under both the law of master and servant and the Workmen's Compensation Act of Texas as said act has been interpreted and applied by the courts of Texas. It also shows that defendant was a subscriber under the Workmen's Compensation Act of Texas. Hence, no right of action existed for actual damages for injuries resulting in Amacker's death.

"(b) This Court, in its opinion (132 F. (2d) 431) on the first appeal of this case (No. 10373), clearly

adopted the view that the evidence at the first trial established that Amacker was defendant's special employee. On that question the evidence at the second trial was substantially the same as at the first, but this time it also showed that defendant was a subscriber under the compensation law.

"The remaining specifications are subsidiary to number I, which we feel is controlling and decisive."

After briefs were filed by both parties the case was orally argued in the Court of Appeals on November 15, 1943 (R. 489). In the majority (the *per curiam*) opinion (R. 490-493, 140 F. (2d) 21) the court failed to mention or to discuss the petitioner's said specification of error. It held that the District Court erred in peremptorily charging the jury that the deceased was an invitee upon the premises of petitioner, and also erred in refusing to give petitioner's Requested Instruction No. 1 (R. 424-425, made after the denial of petitioner's motion for a directed verdict) to the effect that if the deceased were a special employee and was under the supervision and control of the defendant (petitioner here), the verdict should be for the defendant. In the latter connection the *per curiam* opinion stated:

"There was substantial evidence to the effect that the deceased was doing work for the defendant and that the defendant not only had the right to supervise and control him in his work, but actually exercised that right."

But, the court did not state that there was any evidence to the contrary; it simply held that the evidence to which it referred (in the quotation just made), presented an issue that should have been submitted to the jury.

Judge WALLER, in a dissenting opinion (R. 493-496, 140 F. (2d) 23-24), held that there was no dispute in the evi-

dence that the defendant had the *right* to the supervision, direction, and control of the deceased, and that under the Workmen's Compensation Statute of Texas and decisions of the State of Texas, and under the well-known borrowed servant rule, Amacker became and was the special employee of the petitioner and therefore the right of recovery is measured exclusively by said statute. He also said that in its first opinion the court had held that Amacker was under the supervision and control of petitioner. He concluded by stating that in his view the motion of the petitioner for a directed verdict should have been sustained.

Jurisdiction.

(1) The jurisdiction of this Court is invoked under Section 240 (a) of the judicial code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347).

(2) The judgment of the Court of Appeals was rendered in a civil action.

(3) The date of the judgment to be reviewed is December 16, 1943. Petition for rehearing filed by respondents was denied February 7, 1944.

(4) It is believed that the following cases sustain the jurisdiction of this Court:

West v. American T. & T. Co., 311 U. S. 223, 85 L. ed. 139;

Story Parchment Company v. Patterson Parchment Paper Company, et al., 282 U. S. 555, 75 L. ed. 544;

Galloway v. United States, 319 U. S. 372, 87 L. ed. 1458;

Cities Service Oil Company v. B. P. Dunlap, et al., 308 U. S. 208, 84 L. ed. 196;

Griffin v. McCoach, 313 U. S. 498, 85 L. ed. 1481.

Question Presented.

The following question is presented:

Whether, as contended by petitioner, the Court of Appeals erred in failing to hold that the evidence was undisputed to the effect that the deceased Amacker was a special employee of petitioner at the time he was performing the work in cleaning the petitioner's oil stock tank, and, since petitioner was a subscriber under the Workmen's Compensation Law of Texas, in failing to hold that petitioner's motion for a directed verdict should have been sustained, and erred in failing to reverse the cause and to render judgment therein for petitioner, instead of reversing and remanding the cause for a new trial.

Reasons Relied Upon for the Allowance of the Writ.

The discretionary power of this Court is invoked upon the following grounds:

(a) The Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way clearly in conflict with a local statute and decisions, namely, the Workmen's Compensation Law of Texas and such Texas cases as the following:

- Maryland Casualty Co. v. Donnelly*, (Civ. App. Tex.) 50 S. W. (2d) 388;
- Western Casualty & Surety Co. v. Mueller*, (Civ. App. Tex.) 169 S. W. (2d) 223;
- Magnolia Petroleum Co. v. Francis*, (Civ. App. Tex.) 169 S. W. (2d) 286;
- Shannon v. Western Indemnity Co.*, (Tex. Com. App.) 257 S. W. 522;
- Judson & Little v. Tucker*, (Civ. App. Tex.) 156 S. W. 225.

(b) The Circuit Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's discretion to review its action. Said court, by its decision, has imposed upon the parties the necessity of trying this case a third time regardless of the fact that it clearly appears from the evidence that respondents have no right of action for damages. The sole remedy of respondents (the one which they should have pursued) was the institution of proceedings before the Industrial Accident Board of the State of Texas for the recovery of workmen's compensation.*

Prayer.

Wherefore, petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court, for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 10772, Skelly Oil Company, Appellant, *vs.* Madie Ray Amacker, individually and as guardian of Barbara Ann Amacker, *et al.*, minors, Appellees," and that said judgment of the Circuit Court of Appeals for the Fifth Circuit may be reviewed by this Honorable Court and reversed and rendered in favor of petitioner and that your petitioner have such other and further relief

*Respondents have already recovered workmen's compensation from the insurance carrier of Gibbins & Heasley, Inc., and damages from Gibbins & Heasley, Inc., as a result of a compromise of their claims therefor (R. 407-408), involved in suits therefor (R. 401-404, 404-407).

in the premises as to this Honorable Court may seem meet
and just.

SKELLY OIL COMPANY,
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